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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Case No. MDL 3:07-md-1827 SI
	CLASS ACTION
This Document Relates to: ALL DIRECT PURCHASER CLASS ACTIONS	**PLAINTIFFS' OPPOSITION TO TOSHIBA ENTITIES' MOTION TO SET OFF SETTLEMENT AMOUNTS AGAINST SPECIAL VERDICT'S DAMAGES AWARD** Date: August 24, 2012 Time: 9:00 a.m. Place: Courtroom 10, 19th Floor

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INTRODUCTION

Toshiba's Motion To Set Off Settlement Amounts Against Special Verdict's Damages Award ("Toshiba's Motion") does not even attempt to meet Toshiba's burden to show that the damages award should be reduced by the amount of prior settlements. Specifically, Toshiba has not argued, much less proved, that the jury compensated the plaintiff class for the same injuries as the prior settlements. If Toshiba wants to avail itself of the benefit of a set off, it must show that Plaintiffs were already compensated for the exact same injury. To be entitled to a reduction of damages awarded to Plaintiffs, Toshiba must acknowledge and embrace the fact that its liability is premised upon its participation in the broad conspiracy encompassing the Crystal Meetings. To the extent it denies this is the basis for the finding of liability, Toshiba should be given no set off or, alternatively the trebled damage award should be reduced by no more than 10% of the total prior settlements, the percentage of Plaintiffs' requested damages awarded by the jury.

BACKGROUND

Prior to the trial with Toshiba, Plaintiffs reached Court-approved settlements with these defendants:[1]

Company	Amount	Country
Chunghwa Picture Tubes	$ 10,000,000	Taiwan
Chi Mei	$ 78,000,000	Taiwan
HannStar	$ 14,900,000	Taiwan
Mitsui	$ 950,000	Taiwan
LG Display	$ 75,000,000	Korea
Samsung	$ 82,672,242	Korea
Sharp	$105,000,000	Japan
Sanyo	$ 3,500,000	Japan

[1] On July 6, 2012, Plaintiffs moved for preliminary approval of a settlement with Taiwanese manufacturer AU Optronics for $38,000,000. If approved, the class settlements would total $443,022,242.

Hitachi	$ 28,000,000	Japan
Epson	$ 7,000,000	Japan
Total	**$ 405,022,242**	

ARGUMENT

1. Legal Standard

The "one satisfaction" rule is the "legal principle that an injured party is ordinarily entitled to only one satisfaction for each injury." *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1230 (9th Cir. 1989). "The [one satisfaction rule] contains no rigid rule against overcompensation. Several doctrines . . . recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 219 (1994). The one satisfaction rule is an equitable doctrine that relies on the court's discretion in determining its applicability. *See Franklin*, 884 F.2d at 1232 ("The [one satisfaction] rule is based in common law; it is not statutorily mandated."); *Chisholm v. UHP Projects, Inc.*, 205 F.3d 731, 737 (4th Cir. 2000) (noting that the one satisfaction rule is an "equitable doctrine").

To justify any discretionary settlement set off at all, a non-settling defendant "bears the burden of proving 'that the damages assessed against him have in fact and in actuality been previously covered in a prior settlement . . . .'" *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1261 (10th Cir. 1988) (quoting *Cates v. United States*, 451 F.2d 411, 417-18 n.18 (5th Cir. 1971), implied overruling on other grounds recognized in *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1231 (10th Cir. 1996)); *see also Howard v. Gen. Cable Corp.*, 674 F.2d 351, 358 (5th Cir. 1982) ("The burden of proving common damages rests with the appellant because it was the party that sought the credit."). Whether an award represents "common damages" with a prior settlement turns on "the victim's *injury*, and not . . . the causes of action that may arise from that injury." *U.S. Indus.*, 854 F.2d at 1261 (emphasis in original). Courts have indicated that the rule applies only where the settling and non-settling defendants are responsible for a single, identical harm. *See, e.g., id.* at 1237 n.20 ("The critical focus, therefore, must be whether the jury award compensated the plaintiff for the same injury as the settlements."); *Franklin*, 884 F.2d at 1231 (rule applies to limit a plaintiff to "one satisfaction for any given injury"); *Fluck v. Blevins*, 969 F.

Supp. 1231, 1236 (D. Or. 1997) (noting the rule that "a plaintiff may not obtain more than one satisfaction for the same injury"); *Walker v. Belvedere*, 16 Cal. App. 4th 1663, 1668 (1993) (observing that rule operates to diminish liability of those liable "for the same harm"); *see also* Rest. 2d of Torts § 885 ("Payments made by one of the tortfeasors on account of the tort either before or after judgment, diminish the claim of an injured person against all others responsible for the same harm.").

2. Toshiba Has Not Attempted To Meet Its Burden

Toshiba has not met its burden under the one satisfaction rule to show that Plaintiffs were already compensated for the exact same injury. In support of its motion, Toshiba merely states that "Plaintiffs proceeded to trial against Toshiba on the same claim that they settled with each of the other Defendants." Toshiba's Motion at 2. But whether the plaintiffs proceeded on the same claim or "cause of action" is not dispositive. *U.S. Indus.*, 854 F.2d at 1261 (set off depends on "the victim's *injury*, and not . . . the causes of action that may arise from that injury") (emphasis in original). Toshiba does not contend, much less show, that the jury's award compensated Plaintiffs for the same injuries as the prior settlements. Toshiba never undertakes to analyze the evidence and theories presented at trial and explain how they fully overlap with prior settlements. *Cf. U.S. Indus.*, 854 F.2d at 1237-39 (analyzing theories of conspiracy proceeded on at trial to determine set-off value if any of prior settlements). Perhaps this is because Toshiba does not wish to affirmatively embrace the jury finding that it was a participant in the broad conspiracy that included the Crystal Meetings and agreements.

Toshiba may be trying to keep its options open in subsequent trials by opt-out plaintiffs, where it may plan to argue that the verdict here is not sufficient to provide a basis for either collateral or judicial estoppel.[2] No matter. It is not the responsibility of Plaintiffs, or the Court, to

[2] "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (citation omitted). "The application of judicial estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible (footnote continued)

perform the relevant analysis. It is Toshiba's job, as the party invoking the equitable powers of the Court, to justify paying nothing for the harm it visited on Plaintiffs. Toshiba has not done so, and it may not cure this defect in its reply brief. *See A.D. v. California Highway Patrol*, C 07-5483 SI, 2009 WL 733872 (N.D. Cal. Mar. 17, 2009) (Illston, J.) ("It is improper to raise new arguments for the first time in a reply brief because the other party does not have a chance to respond.") (citing *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 843 n. 6 (9th Cir. 2004); *United States v. Rearden*, 349 F.3d 608, 614 n. 2 (9th Cir. 2003) ("We decline to consider Rearden's argument ... because it is raised for the first time in reply."); *Cedano–Viera v. Ashcroft*, 324 F.3d 1062, 1066 n. 5 (9th Cir. 2003) ("We decline to consider new issues raised for the first time in a reply brief.")).

3. Because Toshiba Has Not Met Its Burden, It Is Not Entitled To A Set Off

Plaintiffs requested the jury to award $171 million for the Panel Class and $696 million for the Finished Products Class. The jury ultimately decided that the Panel Class was entitled to $17 million and that the Finished Products Class was entitled to $70 million. This is a stark contrast to the over $500 million in gross gains the jury found beyond a reasonable doubt in AUO's criminal trial, *U. S. v. AUO et al.*, 3:08-cr-00110-SI (Dkt. 851) (March 13, 2012). The jury's award is approximately 10 percent of what Plaintiffs' evidence supported.

In light of Toshiba's failure to meet its burden, Plaintiffs should not be punished for their successfully negotiating pretrial settlements with other defendants. *See McDermott*, 511 U.S. at 219-20 ("More fundamentally, we must recognize that settlements frequently result in the plaintiff[] getting more than he would have been entitled to at trial. Because settlement amounts are based on rough estimates of liability, anticipated savings in litigation costs, and a host of other factors, they will rarely match exactly the amounts a trier of fact would have set. It seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss.").

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statements in two different cases." *Id.* at 783 (citation omitted).

4. The Form Of Judgment

Because Toshiba failed to carry its burden to show that Plaintiffs' pretrial settlements already compensated them for the identical injury that the jury found Toshiba caused, it would be inequitable for the Court to allow Toshiba the benefit of a total set off. Unless Toshiba can show that the injuries were identical, its motion should be denied and the jury's award should remain in full. Alternatively, for the reasons stated above, the Court should only reduce the compensatory damages award by no more than 10% of the total settlement amounts.

Plaintiffs will shortly move for a form of judgment consistent with this approach. The instant motion, and the motion for approval of Plaintiffs' form of judgment should be heard and decided together.

CONCLUSION

For the above stated reasons, Toshiba's motion to set off the jury's damages award should be denied.

Respectfully submitted,

DATED: July 25, 2012

PEARSON, SIMON, WARSHAW & PENNY, LLP

By: */s/ Bruce L. Simon*
BRUCE L. SIMON

DATED: July 25, 2012

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Attestation: The filer of this document attest that concurrence in the filing of this document has been obtained from each of the other signatories.

By: /s/ *Bruce L. Simon*
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